

The Testimony of the Honorable William J. Middendorf II

On

The United Nations Convention on the Law of the Sea

Before

The Senate Select Committee on Intelligence

June 8, 2004

Mr. Chairman, it is an honor to have the opportunity to testify before this distinguished committee on the matter of Senate advice and consent to the ratification of the United Nations Convention on the Law of the Sea.

Those who founded our nation recognized the power to make treaties is an extremely important power. In their wisdom, they sought to ensure that treaties would serve the national interest by dividing that power between the executive branch and the Senate. Article II, Section 2, of the Constitution states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." Further, Article II establishes a two-thirds voting requirement for the approval of treaties by the Senate. Clearly, they intended to place the burden on the proponents of a treaty to demonstrate its value to the United States. The far-reaching provisions of the treaty that is the subject of this hearing amply demonstrate why the nation's founders divided the treaty-making power. There are compelling reasons why the Senate should take the time and care necessary to review this treaty and understand all its implications.

In March 23rd testimony before the Senate Environment and Public Works Committee, Assistant Secretary of State for Oceans, International Environment, and Scientific Affairs John F. Turner confirmed that the administration supports Senate approval for the ratification of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention). The Administration's position is puzzling to me because the United States had considered and rejected the Convention

during the Reagan Administration. I do not see a compelling reason to revisit the issue today.

While proponents of the Convention argue that the Clinton Administration resolved the problems with the treaty that led to its rejection in the 1980s, through renegotiation in 1994, the fact remains that it represents a potential turning point for the U.S. in the history of international relations. The Convention presents the U.S. with a stark choice. On the one hand, the U.S. may enter into this treaty and proceed for the first time on a path that cedes U.S. sovereignty to executive and quasi-judicial international authority with compulsory powers, including the power to tax, or reject the treaty and stick to the tried and true international system where relations are established between and among sovereign states.

While the Convention contains a wide variety of questionable provisions, its real danger stems from the fact that the treaty represents more than the sum of its questionable provisions. It establishes open-ended procedures for administering these provisions that could lead to negative outcomes for the U.S. that are all but impossible to predict by simply reading its text. If the U.S. becomes a participant in this treaty, following a move by the Senate to approve ratification, it may regret it in the years ahead.

Myriad Problems. The Convention has a variety of problems. This is not surprising given that the treaty takes up more than 150 pages. What is surprising is that even the proponents of the treaty both inside the Administration and outside it have

publicly acknowledged a number of the dangers associated with several specific provisions. Prior to any vote by the Senate to consent to the ratification of the Convention, all senators should fully understand the dangers posed by these provisions. They should not, however, stop there. Senators need to take the additional step of understanding each of these provisions in the context of open-ended and in some instances compulsory dispute settlement and other procedures, over which the U.S. will only have limited control and that could produce adverse outcomes that are all but impossible to predict. The following represents four general shortcomings of the Convention:

Problem #1: Loss of Sovereignty. Traditionally, treaties, with only narrow exceptions, have been defined as formal agreements between and among sovereign states that help define their relations to each other as sovereign states. They are inherently political agreements. The option to change such relations and the concomitant power to discontinue adhering to the terms of a treaty is solely the prerogative of the sovereign.

First and foremost, the Convention represents a departure from that tradition. It establishes institutions with executive and judicial powers that in some instances are compulsory. For example, Section 4 of the Treaty establishes the International Sea-Bed Authority. The authority basically is given the power to administer to the "area" under the jurisdiction of the treaty, which includes all the world's oceans and seabed outside national jurisdiction. This is a granting of executive powers to the authority that supersedes the sovereign power of the participating states. Of even greater concern, Part

XV of the Convention establishes dispute settlement procedures that are quasi-judicial and mandatory. Once drawn into this dispute settlement process, it will be very difficult for the U.S. extricate itself from it.

Proponents of the Convention acknowledge the far-reaching political and legal ramifications of U.S. adherence to the treaty. University of Virginia School of Law Professor John Norton Moore, a supporter of the Convention who testified before the Senate Foreign Relations Committee on October 14, 2003, stated that he sees it as a means for fostering the rule of law in international affairs. In fact, he states that adherence to the Convention is "one of the most important law-defining international conventions of the Twentieth Century."

This is quite an assertion. In fact, it is the most troubling aspect of the Convention because the conduct of international relations for centuries has been a more a political than a legal process. Unacknowledged in the language about fostering the rule of law in international relations is the reality that in this particular case it entails subordinating the powers of the participating states to the dictates of an international authority. When it comes to the essential powers for the conduct of international relations, the use of force and the exercise of diplomacy, they are not readily divisible but they are readily transferable. The Convention is a vehicle for transferring these essential powers from the participating states to the international authority established by the treaty itself. It represents the establishment of the rule of law over sovereign states more than it is establishing a rule of law made by them.

Former Secretary of State George Shultz provides a succinct rejoinder to those who envision the rise of the “rule of law” in international relations in the way it is devised in this Convention. Speaking at the Library of Congress on February 11, 2004, Secretary Shultz stated:

First and foremost, we must shore up the state system. The world has worked for three centuries with the sovereign state as the basic operating entity, presumably accountable to its citizens and responsible for their well-being. In this system, states also interact with each other to accomplish ends that transcend their borders. They create international organizations to serve their ends, not govern them.

Problem #2: Unnecessary limitations on the exploitation of resources. The Convention was drafted at time when the failed policies of state control over resources to meet demands for the redistribution of those resources were in vogue. Specifically, Article 140 of the Convention states that all activities outside the jurisdictional waters of individual states “be carried out for the benefit of mankind” while “taking into particular consideration the interests and needs of developing States.” These international waters and the accompanying seabed are defined as those outside the 200-nautical-mile

exclusive economic zone (EEZ) the treaty leaves within the jurisdictional control of participating states.

It is unclear why the U.S. should accept a treaty that is so explicitly biased against its interests when it comes to the access to resources. This is particularly so when this bias reflects a policy preference for the redistribution of resources that the world abandoned over a decade ago. The world economy is now organized around the requirements of the market. As elsewhere, the application of market principles regarding the exploitation of sea-based resources will ensure the effective and efficient use of those resources. U.S. adherence to the Convention, therefore, would represent a step backward.

Problem #3: A step in the direction of international taxing authority. The Convention contains an ill-advised revenue-sharing provision that is applied to income derived from oil and gas production outside the EEZ. The general bias in the Convention, as I indicated earlier, is in favor of the redistribution of seabed resources. This bias is codified in the area of oil and gas revenues. The U.S. will be forced to pay a contribution to the International Sea-Bed Authority created by the treaty based on a percentage of its production in the applicable area beyond the 200-mile limit.

While he asserted the argument against this revenue-sharing provision was unconvincing, State Department Legal Advisor William H. Taft IV acknowledged it was an argument that could be made in the course of October 21, 2003 testimony before the Senate Foreign Relations Committee. Mr. Taft understates the problem. By any

reasonable definition, this provision would for the first time allow a U.N.-affiliated international authority to impose a tax directly on the U.S. for economic activity. At least, I am unaware of any precedent for this kind of international taxing authority. Shoring up the state system, as recommended by former Secretary of State Shultz, means that international institutions should be funded by the voluntary contributions of their member states. The extent to which these international institutions are allowed access to independent streams of revenue is the extent to which they will seek to obtain governing authority at the expense of the state system. While the revenue-sharing provision related to oil and gas production in the Convention is a relatively modest step in this direction, it is still a step in the wrong direction.

Problem #4: Unnecessary Risks to National Security. Proponents of the Convention argue that it promotes U.S. security by codifying a variety of rights to navigate the world's oceans that are valued by the Navy. While the Navy, quite appropriately, seeks the codification of these rights, it should be pointed out that a significant portion of these rights are already established by a series of four 1958 "Geneva Conventions on the Law of the Sea" and customary international practice.

On the other hand, the risks to national security posed by the Convention are often understated. For example, Deputy Assistant Secretary of Defense for Negotiations Policy Mark T. Esper, who testified in favor of the Convention, told the Senate Foreign Relations Committee in an October 21, 2003, hearing that the mandatory dispute resolution mechanism could be used by states unsympathetic to the U.S. to curtail its

military operations even though such operations are supposed to be exempt from the mechanism. This is because it is unclear by the terms of the treaty what activities will be defined as military. While the Bush Administration believes that it will be up to each State Party to determine for itself what activities are military, it is uncertain enough about the issue that it is recommending the U.S. submit a *declaration* reserving its right to determine which activities are military. Unfortunately, it is not at all certain that a declaration will suffice to protect vital U.S. national security interests. Other states may choose to accept or ignore the declaration, or a future administration may accept the jurisdiction of a tribunal and be surprised if precedent-setting decisions go against U.S. interests. While in the future the Navy may recommend that the U.S. reject a claim of jurisdiction for a tribunal, civilian authorities both inside and outside the Department of Defense may overrule the Navy. Amending the text of the treaty may be the only certain way to protect U.S. interests against overreaching by other states regarding the mandatory dispute resolution mechanism. This is my view, in part, because I am not aware of a precedent for such a mandatory dispute settlement mechanism that could extend to such sensitive areas.

Of particular interest to this Committee, is the question of the applicability of the compulsory dispute settlement procedures in the Convention regarding intelligence activities. Given that the Convention is ambiguous regarding the applicability of these procedures to military activities, it is impossible not to conclude that it is much more ambiguous regarding their applicability to intelligence activities. At least the Convention explicitly exempts military activities from compulsory dispute settlement procedures.

The ambiguity regarding military activities stems from the Convention's failure to define what activities are military and therefore exempt. In the case of intelligence activities, the treaty fails to acknowledge that any such activities are entitled to exemption.

The idea that U.S. intelligence activities could become the subject of mandatory international dispute settlement procedures strikes me as nothing short of bizarre. What kind of discovery procedure is going to apply to an international inquiry into U.S. intelligence activities? I cannot imagine that the U.S. will describe its intelligence activities to an international panel assigned the responsibility to settle a dispute under the Convention. If the U.S. refuses to do so, however, it would be found in violation of the Convention. Clearly, this is untenable.

Further, the unpredictable nature of mandatory dispute settlement procedures is evident as result of Ireland's attempt to interfere with British construction of a nuclear facility on British territory. While Ireland is taking this action under a multilateral maritime environmental convention, the action demonstrates that maritime treaties are obtaining extra-territorial reach. What economic activities may the U.S. take on its territory that could result in a mandatory dispute settlement procedure under the United Nations Convention on the Law of the Sea? It is impossible to say because the outcomes of the settlement procedures are unpredictable. Could the same procedures be applied against U.S. military and intelligence activities? Again it is impossible to say.

The Senate has the power to advise as well as consent. The four general shortcomings with the Convention that I have described are derived from a longer list of specific shortcomings in a variety of the specific provisions it contains. There are more concerns that I have not detailed here, not the least of which is a simplified treaty amendment process that raises constitutional questions.

In recent years, the Senate has paid more attention to its role in consenting to the ratification of treaties and less to its power to advise the executive on their content. The rules of the Senate codify this power, in part, by allowing Senators to offer substantive amendments to the text of a treaty. If ever there were a case for the Senate to reclaim the full measure of its power to advise, this is it. I believe that senators who conclude there are shortcomings in the substance of this treaty should not hesitate to propose amendments to the text of the Convention if it comes before the full Senate. Clearly, it is preferable to resolve these shortcomings now over letting the Convention come into force for the U.S. and hope they do not prove injurious to U.S. interests.

Conclusion. The United Nations Convention on the Law of the Sea is a modest step toward the creation of an international sovereign authority unchecked by the governed. Nevertheless, it is a significant one. Given that modern states, including the one envisioned for a united Europe, are the product of a combination of just such steps, it is one the United States should not be taking. Further, the treaty contains a number of specific provisions in such areas as regulation, energy, the environment, national security, and constitutional law that are deeply troubling.

National leaders in Europe seem to aspire to relegating their nations to the status of provinces inside a supranational European authority. In this context, it is not surprising that some outside the United State see this move in the direction of broader authority for international entities, which Secretary Shultz has warned against, as desirable.

As for America's leaders, they should firmly reject such aspirations for their nation now. Insofar as the United Nations Convention on the Law of the Sea seeks to move the United States in this direction and serves as an indicator of steps yet to come, it poses a danger to the vision America's fathers had for the nation they founded in 1776.